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IN THE

Supreme Court of the United States

October Term, 1946

No. 1234

A. J. HELFEND,

Petitioner,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,

Respondent.

Petition for Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support Thereof.

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Dated: Los Angeles, California, April 8, 1947.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petition for Writ of Certiorari to the United States Emergency Court of Appeals.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, A. J. Helfend, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Emergency Court of Appeals dismissing the complaint of the petitioner herein, and in effect affirming a denial of the protest of the petitioner herein with the Price Administration of the Office of Price Administration.

The judgment of the United States Emergency Court of Appeals was entered on February 17, 1947, and a Petition for Rehearing of said judgment was denied and Order of Denial entered on March 13, 1947.

STATEMENT OF THE MATTERS INVOLVED.

On June 1, 1944, the Long Beach Director of the Los Angeles Defense Rental Area, Office of Price Administration, issued his notice of intention to decrease the rents of the Helfend Hotel, owned and operated by the petitioner herein in accordance with the provisions of Section 5(c)(1) of the Rent Regulation for Housing, Office of Price Administration. [T. 76.] A new notice of intention was issued on June 7, 1944, with a slight correction. The petitioner, through his counsel, arranged for a hearing on the proposal and submitted written objections to the proposed order, together with written objections to the sufficiency of the notice. [T. 88-91.] On June 23, 1944, the order was issued, at a time prior to the date of the hearing, which order decreased the rents of the hotel more than fifty per cent.

(Note: All references to "T." refer to Transcript of Proceedings before the Price Administrator which is part of the Record herein.)

On September 14, 1944, without any notice of their intention to decrease rents, a further order was made by the Los Angeles Rental Area, Office of Price Administration, decreasing the rates of the units in the Helfend Hotel and establishing them on a daily, weekly and monthly basis.

On August 17, 1944, the petitioner had filed his application for review of the Los Angeles Defense Rental Directors determination with the Regional Director of the Office of Price Administration in San Francisco, California. [T. 150.]

An application for review of the order of September 14, 1944, was also made to the Regional Director and

by order of the latter the two applications for review were consolidated.

On April 30, 1945, the Regional Director issued his order modifying the Los Angeles Defense Rental Area orders of June 23, 1944, and September 14, 1944. [T. 227. His opinion is listed in T. 230-235.]

An appeal (protest) was taken from the regional order of April 30, 1945, to the Price Administrator, Office of Price Administration, which affirmed the regional order with a slight modification, on May 10, 1946. [T. 54-57.]

An appeal was taken from the order of the Price Administrator to the United States Emergency Court of Appeals on May 31, 1946. The United States Emergency Court of Appeals dismissed the complaint on February 17, 1947, and a Petition for Rehearing was denied on March 13, 1947.

There appears to be no dispute as to the fact that the original local order of June 23, 1944, was issued without any evidence to support the order and that the petitioner was denied an opportunity to ascertain if the local office had any evidence upon which to support its order and that he was also deprived of a right to have a hearing which had been promised him.

Petitioner relies, not only upon the continued statements made by him throughout the various proceedings that the local Los Angeles office had no factual foundation to support their order of June 23, 1944, but upon the complete transcript of proceedings before the Price Administrator, which does not include any such evidence.

BASIS OF JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240, Judicial Code 28, U. S. C. A., Section 347; and under Section 204D of the Emergency Price Control Act of 1942, and amendments thereto.

QUESTIONS PRESENTED.

(1) Was there a fatal non-compliance with the "Due Process" provision of Article V of the Amendments to the United States Constitution where a local rent director acting under the provisions of the Emergency Price Control Act of 1942 issued an order decreasing existing rents of a hotel more than one-half without granting the landlord of the hotel an opportunity to have a hearing on the matter or to ascertain the factual basis for the order and *where there were no facts or any evidence to support such an order?*

(2) Where a protest was made to the Price Administrator, Office of Price Administration, that a local rent director's order was void *ab initio* because of material irregularities in the proceedings prior to the issuance of the order, did the Price Administrator have the authority to state that the protest was a trial *de novo,* use the same record that had been used in an appeal to a regional director, and disregard the voidness of the original order?

(3) Where an order issued by a local rent director, analogous to the judgment of a trial court, is void *ab initio,* are all further proceedings arising out of the order also void where the landlord continually contended that the original order was void *ab initio?*

(4) Where the Rent Regulation Procedure, Office of Price Administration, provided that a local Rent Director could not issue an order until after giving notice of his intention to do so to the interested party, did failure to give such notice invalidate the order?

(5) Where the business of a property owner is the operation of a hotel with rents established before the creation of a local defense rental area, is an order decreasing the rents below the actual costs of operation within the purview of the purposes of the Emergency Price Control Act of 1942?

(6) Where the new rates set by the Rent Director and Regional Director are so low in comparison to the rents for comparable housing as to indicate arbitrariness are the findings of fact conclusive on appeal?

(7) Where there was admitted bias against the petitioner by the office of the local rent director and the arbitrary order of the local rent director shows unfair and capricious consideration of the petitioner's rights, is the original order void *ab initio* so as to cause all further proceedings arising out of the original order to become invalidated where the petitioner continually and vigorously raised this defense on further proceedings?

(8) Is it possible for a landlord to have a genuine hearing *de novo* on a protest to the Price Administrator from an order issued by a local Rent Director where the same governmental agency conducts the proceedings on the protest, acts as judge and jury on the matter and *opposes the landlord on his protest?*

REASONS FOR ALLOWANCES OF THE WRIT.

(1) The ultimate question in the case before the Court is whether or not an order, which is void *ab initio*, can still be the basis for further proceedings or whether the latter proceedings on appeal are also void because the original order is void *ab initio*.

(2) Where the United States Constitution, Fifth Amendment, provides that no person may be deprived of property without due process of law, the act of the local rent director of the Office of Price Administration in decreasing rents more than one-half, which rents had been in existence in July 1942 and the Los Angeles Defense Rental area was established, in November, 1942, without granting the landlord an opportunity to have a hearing which had been promised him and without having any factual foundation to support the order, then the latter was a deprivation of the petitioner's constitutional rights.

(3) Where the Rent Regulation Procedure, Section 1300.207, Office of Price Administration, provided that where the rent director, on his own initiative, deemed it appropriate to enter an order he should, before taking such action, serve notice upon the landlord of the housing accommodations involved, stating the proposed action and the grounds therefore, and where the rent director issued an order without serving any notice of his intention to do so, and such order deprived the landlord of valuable property rights, then that order was void.

(4) Congress never intended to place in the hands of the Office of Price Administration the authority and power to issue an order which would decrease rents of a hotel to a point where they were lower than the actual costs of operation of the hotel and where the operation of the

hotel was the business of the landlord; that such a power is abhorent to American traditions and will ultimately result in forcing the landlord to cease all operations thereby defeating one of the purposes for which the Emergency Price Control Act of 1942 was passed by Congress.

(5) The decision of the United States Emergency Court of Appeals conflicts with the fundamental rule of law that the United States government, or an agency thereof, cannot deprive a man of property without due process of law.

(6) The decision of the United States Emergency Court of Appeals holds, in effect, that where a congressional statute gives to the United States government certain rights contrary to the limitations of its power as set forth in the United States Constitution and the amendments thereto, that there need not be a material compliance with the procedural method established by the act in exercising the powers granted contrary to constitutional limitations.

(7) There should be a strict interpretation of the provisions of the Emergency Price Control Act of 1942 so that while the purposes of the act might be effectuated the latter should be accomplished with a minimum interference with the constitutional rights of a landlord.

(8) The mere fact that the Price Administrator designates a protest to him as a hearing *de novo,* uses the same record that had been used by the regional office, does not satisfy the requirements of due process of the Fifth Amendment of the United States Constitution.

(9) The new rates set by the Rent Director and Regional Director are so low in comparison to the rates for comparable housing as to indicate the arbitrary rulings of the agency.

(10) The decision of the United States Emergency Court of Appeals holds, in effect, that any governmental agency may issue an order depriving a person of valuable property rights even though there may be no factual foundation or evidence to support such an order and without a hearing prior to the order if, on a protest from such an order to a regional or national officer of the same agency there is a genuine hearing *de novo;* however, the Court failed to distinguish this instant case, where the petitioner was deprived of a hearing and where there was no evidence to support the original order, from those cases where the landlords were deprived of a hearing but where there appeared to be some factual foundation for the issuance of the orders.

CONCLUSION.

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted to review the judgment of the United States Emergency Court of Appeals.

Dated: Los Angeles, California, April 8 1947.

A. J. HELFEND,
Petitioner,

By HIRAM T. KELLOGG,
Counsel for Petitioner.

DAVID A. MATLIN,
Of Counsel.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Petition is well founded and not interposed for delay.

HIRAM T. KELLOGG,
Counsel for Petitioner.

DAVID A. MATLIN,
Of Counsel.

IN THE

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vs.

PHILIP B. FLEMING, Temporary Controls Administrator,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

OPINIONS BELOW.

(1) The order of the rent director of the Los Angeles Defense Rental Area was issued June 23, 1944. [T. 100.]

(2) A further order of the rent director of the Los Angeles Defense Rental Area was issued on September 14, 1944. [T. 178.]

(3) The order of the regional administrator of the Office of Price Administration, Region VIII, was issued on April 30, 1945. [T. 227.]

(4) The order of the price administrator of the Office of Price Administration was issued May 10, 1945. [T. 54.]

(5) The decision of the United Emergency Court of Appeals was issued February 17, 1947, and has not, as

yet, been reported in the Federal Reporter. (The opinion of the Court in printed in the Appendix hereto.)

(6) The order denying the Petition for Rehearing by the United States Emergency Court of Appeals was filed and entered March 13, 1947.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 204, subdivision "D" of the Emergency Price Control Act of 1942, which reads as follows:

> "Within 30 days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a Petition for a Writ of Certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to a review by the Supreme Court in the same manner as a judgment of a Circuit Court of Appeals as provided in Section 240 of the Judicial Code as amended. (U. S. C. 1934 Edition, Title 28, Section 347.) . . . The Emergency Court of Appeals and the Supreme Court, upon review of judgments and orders of the Emergency Court of Appeals shall have exclusive jurisdiction to determine the validity of any regulations or orders issued under Section 2 of any price schedule effective in accordance with the provisions of Section 206 and of any provision of any such regulation, order or price schedule."

This action is one arising out of Section 2 of the Emergency Price Control Act of 1942 and in which action the petitioner contends the invalidity of certain orders.

The jurisdiction of this Court is invoked upon the following grounds:

(1) That the Emergency Court of Appeals and the Supreme Court of the United States have exclusive juris-

diction to determine the validity of any regulation or order issued by the Price Administrator, Office of Price Administration.

(2) That the United States Emergency Court of Appeals has decided an important question of constitutional rights in a way untenable and which conflicts with the weight of authority.

(3) That the said United States Emergency Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

(4) That the said United States Emergency Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

(5) That the United States Emergency Court of Appeals, by its decision, has sanctioned a departure from the accepted and usual course of quasi-judicial proceedings by a local rent director of the Office of Price Administrator so as to call for an exercise of this Court's power of supervision.

STATEMENT OF FACTS.

The petitioner, A. J. Helfend, purchased the Helfend Hotel located in Wilmington, California, in May, 1942, which hotel had just been completely renovated, and immediately thereafter petitioner completely furnished the hotel with new, modern furniture.

The petitioner investigated rents charged in comparable hotels in the vicinity and fixed his maximum rents in accordance with these prevailing rents and first rented the premises in the early part of July, 1942.

The Los Angeles Defense Rental Area was established in November, 1942, and the maximum rent date was set as March, 1942.

On June 2, 1944, the petitioner received notice from the Long Beach Director of the Los Angeles Defense Rental Area that it was their intention to decrease the rents of the Helfend Hotel in accordance with the provisions of Section 5 (c)(1) of the Rent Regulation for Housing, Office of Price Administration. Attached to the notice was a list of the rates proposed to be set as the maximum rents for the accommodations in question. On June 8, 1944, the said Rent Director sent a similar notice with a slight correction.

On June 9, 1944, counsel for the petitioner telephoned the Long Beach Rent Director requesting a hearing before the issuance of any order, which request was granted. [T. 83-84.] The hearing was set for June 26, 1944, and on June 20, 1944, petitioner's attorney confirmed the appointment by letter and also sent objections to the proposed order, together with an objection to the sufficiency of the notice of intention to decrease rents. [T. 85-93.] The objections to the sufficiency of the notice of intention to decrease rents carried the demand of the petitioner that the Rent Director disclose the exact basis upon which the proposed action was predicated.

On June 23, 1944, the order decreasing rents more than one-half was issued at a time prior to the date of the hearing. This action was a basis for a vigorous protest by the petitioner to the local Rent Director and to the Price Administrator of the Office of Price Administration.

On July 19, 1944, the petitioner's attorney received, from the Los Angeles Deputy Rent Director, a letter stating that the petitioner had been in communication with the Long Beach office in reference to the proposal of the decreased rents and had made himself extremely obnoxious to the Long Beach office. This letter does not appear in

the record. However, the answer to that letter by petitioner's attorney dated July 27, 1944, denying the statements made in the aforementioned letter and also requesting a copy of the evidence upon which the order of June 23, 1944, decreasing rents was based. [T. 118-119.]

On August 12, 1944, the Los Angeles Defense Rental Area informed the petitioner of their intention to decrease rents of certain rooms in the Helfend Hotel. [T. 126-127, 130-147.]

On August 17, 1944, petitioner filed his application for review of the Los Angeles Defense Rent Director's determination to the Regional Director in San Francisco, California. [T. 150-168.]

On September 14, 1944, an order was made by the Los Angeles Defense Rental Area decreasing the rents of the units of the Helfend Hotel and establishing them on a daily, weekly and monthly basis with the exception of certain rooms which were not placed on a daily basis. [T. 178-179.]

On September 20, 1944, petitioner's attorney objected to the order of September 14, 1944, upon the ground that there had been new monthly rates for the 2 and 3-room units established without any notice of intention to do so having been sent to the petitioner by the local Rent Director and pointing out that the petitioner had had no opportunity to file any written objections to the new monthly rates for the 2 and 3-room units. [T. 182-183.]

On April 30, 1945, the Regional Director modified the Los Angeles Defense Rental Area orders of June 23, 1944, and September 14, 1944. [T. 207-229.]

A protest was filed with the Price Administrator of the Office of Price Administration from the Regional Order

of April 30, 1945. The Price Administrator affirmed the Regional Order of April 30, 1945, with a slight modification, on May 10, 1946. [T. 54-56.]

An appeal was taken from the order of the Price Administrator to the United States Emergency Court of Appeals on May 31, 1946. The complaint was dismissed by the United States Emergency Court of Appeals on February 17, 1947, and the petitioner filed a Petition for Rehearing, which petition was denied on March 13, 1947.

SPECIFICATIONS OF ERRORS.

The United States Emergency Court of Appeals erred:

(1) In not ruling upon the point raised by petitioner that the local order of September 14, 1944, was void because no notice of intention to establish monthly rates for 2 and 3-room units had ever been sent to petitioner in compliance with the procedural regulations of the Office of Price Administration.

(2) In affirming the order of the Price Administrator, Office of Price Administration, that the protest of the petitioner be denied with slight modifications.

(3) In failing to hold that the original order of June 23, 1944, was void *ab initio* because there was no evidence to support that order.

(4) In failing to hold that the local order of September 14, 1944, was void *ab initio* in so far as the monthly rates for the 2 and 3-room units were concerned.

(5) In failing to hold that the cost of operation is a factor to be considered where the business of the petitioner is the operation of a hotel.

(6) In holding that there is substantial evidence to support the findings of the Price Administrator in reference to the rental rates.

ARGUMENT.

POINT 1.

THE ORIGINAL LOCAL ORDER OF JUNE 23, 1944, WAS VOID AB INITIO IN THAT THE PETITIONER WAS DEPRIVED OF A RIGHT TO HAVE A HEARING HAD NO OPPORTUNITY TO ASCERTAIN THE BASIS FOR THE PROPOSED ORDER AND THERE WAS NO EVIDENCE TO SUPPORT THE ORDER.

The uncontradicted evidence is that before the order was issued, petitioner's attorney had made arrangements with the Long Beach office of the Los Angeles Defense Rental Area to have a hearing on the proposed order. This hearing was never granted and the order was issued three (3) days before the hearing was to take place.

Before the order was issued on June 23, 1944, petitioner's attorney had filed an objection to the sufficiency of the notice of intention to decrease rents and had requested the local Rent Director to submit to petitioner the basis for the proposed order. This request was never granted.

A complete study of the transcript of the proceedings before the Price Administrator, which includes all evidence in this matter since June 1, 1944, shows that there is absolutely no evidence in the transcript that a comparability study was made by the Office of Price Administration to support the order of June 23, 1944. Petitioner and his counsel have repeatedly and consistently requested the Office of Price Administration to advise them of the basis for the order of June 23, 1944, and each request so made has been totally ignored by the Office of Price Administration and its local and regional offices. Petitioner has made a positive and unequivocal allegation in his several communications to the Office of Price Admin-

istration that there is no evidence to support the order of June 23, 1944, and that no comparability study was ever made by the Office of Price Administration prior to the issuance of that order. This positive and unequivocal allegation has never been denied by the Office of Price Administration.

In his appeal to the United States Emergency Court of Appeals petitioner has made the same and identical allegation regarding the lack of any evidence to support the local order of June 23, 1944. This statement was not answered by the Price Administrator of the Office of Price Administration.

On June 7, 1944, petitioner's counsel wrote to the Long Beach office of the Los Angeles Defense Rental Area of the Office of Price Administration stating that he desired a hearing for the purpose of ascertaining the basis for the proposed action. On June 15, 1944, petitioner's counsel stated in a written objection to the proposed action that the notice did not state any basis for the proposed action.

On June 26, 1944, petitioner's counsel advised the Office of Price Administration, by letter, that the Long Beach office had refused to advise him of the basis for the proposed action. On July 19, 1944, petitioner's counsel wrote to Chester L. Bowles, then Director of the Office of Price Administration, Washington, D. C., stating that the Long Beach office had refused to advise him of the basis for the findings to support the order of June 23, 1944. On July 27, 1944, petitioner's counsel wrote to the Deputy Rent Director of the Los Angeles Defense Rental Area stating that the Long Beach office had refused to advise him of the basis upon which the proposed action was founded and requesting a hearing on the matter for the purpose of ascertaining the basis for the order.

On July 31, 1944, petitioner's counsel wrote to the Adjustment Review Officer of the Los Angeles Defense Rental Area stating that he wanted to determine the basis for the order and that he had never been presented with any basis to support the order. On August 16, 1944, petitioner's counsel filed an affidavit with the Regional Officer in San Francisco, Office of Price Administration, stating that he had never been given an opportunity to ascertain the basis for the order of June 23, 1944. On July 20, 1945, petitioner's counsel, in the Protest to the Price Administrator of the Office of Price Administration, stated that it definitely appeared that at the time of the issuance of the order of June 23, 1944, that no comparison had been made with comparable housing as required by Section 5(c)(1) of the Rent Regulations for Housing, Office of Price Administration.

Section 5(c)(1) of the Rent Regulations for Housing, Office of Price Administration, states that maximum rents may be decreased only if they are higher than the rents generally prevailing in the same defense rental area for comparable housing accommodations on the maximum rent date.

For these reasons the petitioner contends that the order of June 23, 1944, was not in compliance with Section 5(c)(1) of the Rent Regulations for Housing and was not based upon any comparability study and had no basis or foundation in fact.

> "Fact findings made by an administrative body or officer without supporting evidence or without a hearing are void under Amendment V to the United States Constitution."
>
> *Bridges v. Wixon,* 144 F. (2d) 927 (C. C. A. Cal., 1944).

"The right to a 'full hearing,' which is essential to the legal validity of an administrative regulation under the authority entrusted by Congress in an administrative agency, embraces a reasonable opportunity to know the claims of the opposing party and to meet them."

Morgan v. United States (Mo., 1938), 304 U. S. 1;

Muller and Co. v. Fed. Trade Com., 142 F. (2d) 511 (C. C. A. 6, 1944).

In a case where an order is issued by a governmental agency without any factual foundation to support the order and without any hearing before the issuance of the order, can it be said that the due process provision of the Fifth Amendment to the United States Constitution is satisfied by the requirement that the person aggrieved may protest the invalidity of the order but that the protest shall be considered a hearing *de novo* thus curing all irregularities that occurred prior to the issuance of the original order?

The original orders issued by the local Rent Director were final orders. The order of June 23, 1944, and the order of September 14, 1944, went into effect on the respective days that they were issued, under the provisions of Section 1300.208-B of Revised Procedural Regulation No. 3 of the Office of Price Administration. From those days onward the landlord was subject to criminal and civil penalties and to injunction proceedings under Section 205 of the Emergency Price Control Act of 1942. These two local orders, for all practical purposes, had the same effect as the judgment of a court of first jurisdiction. It is the contention of the petitioner that there must be due process before the final (local) orders are issued.

How is it possible to have a genuine hearing *de novo* on an appeal (protest) from an order issued by a governmental agency where the same agency conducts the proceedings on appeal, acts as the judge and jury on the appeal, and ***opposes the landlord on his appeal?***

The decision of the Court below (E. C. A.) states that they are not at liberty to set aside the Price Administrator's finding upon a factual issue of this character (referring to the level of rents for comparable accommodations on the maximum rent date) if there is substantial evidence to support them, citing one of their own cases. *Rabkin v. Bowles,* 143 F. (2d) 600 (E. C. A., 1944). Had there been a genuine hearing *de novo* by an impartial tribunal then petitioner would have no complaint with this holding. The decision means that in order to get due process a landlord must incur the very substantial expense of filing a protest, which expense is prohibitive in many cases. But the possibility of successfully prosecuting such a protest may be defeated by the findings of the Price Administrator which, according to the decision, are conclusive on appeal.

In this instant matter the Price Administrator had no genuine hearing *de novo*. The protest was considered on the record of all proceedings to the time of the filing of the protest. This procedure is contrary to the spirit and essence of due process. No new comparability study was made by the Price Administrator.

One of the grounds for this petition is the contention that where an original order is void for lack of due process that all proceedings arising out of that order are also void. The petitioner respectfully submits that there should be a ruling by this Honorable Court on this point.

POINT 2.

PETITIONER WAS ENTITLED TO HAVE THE MATTER CONSIDERED BY A FAIR AND IMPARTIAL OFFICER OF THE LOS ANGELES DEFENSE RENTAL AREA AND TO HAVE HIS EVIDENCE WEIGHED AS AGAINST ANY EVIDENCE ON THE PART OF THE OFFICE OF PRICE ADMINISTRATION.

There is no dispute over the fact that the Long Beach Office of the Los Angeles Defense Rental Area, Office of Price Administration, which issued the order on June 23, 1944, considered the complainant obnoxious. Having that state of mind it was impossible for the Long Beach office to give the petitioner that fair and impartial consideration to which he was entitled.

Petitioner's counsel was promised a hearing on June 26, 1944, but immediately after the local Rent Director received his written objections to the proposed order and to the sufficiency of the notice, the Long Beach office arbitrarily and summarily issued its order depriving petitioner of a right to have a hearing and also depriving him of the right to ascertain the basis for the proposed order. In view of the fact that there was no evidence to support the order of June 23, 1944, a hearing would have disclosed this fact, which would have been of most material importance to the petitioner.

As was stated in the case of *National Labor Relations Board v. Phelps,* 136 F. (2d) 562 (C. C. A. 5, 1943):

> "A fair trial by a unbiased and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge."

In the matter of *National Labor Relations Board v. Ford Motor Company*, 114 F. (2d) 905 (C. C. A., 1940), the Court stated:

> "A trial by a biased judge is not in conformity with due process of law."

POINT 3.

THE DISTRICT ORDER OF SEPTEMBER 14, 1944, IN REFERENCE TO MONTHLY RATES FOR 2 AND 3-ROOM APARTMENTS WAS VOID AB INITIO.

The original order of June 23, 1944, established weekly rates for all of the apartments and single rooms. None of these rates were changed in any respect whatsoever by the order of September 14, 1944, which is entitled "Order Modifying Order Decreasing Maximum Rent." [T. 178.] No notice of intention to establish monthly rents or intention to decrease rents was ever made or sent to the petitioner. Section 1300.207 of the Rent Regulation Procedure, Office of Price Administration, provides that when the Rent Director, on his own initiative, deems it appropriate to enter an order he shall, before taking such action, serve notice upon the landlord of the housing accommodations involved, stating the proposed action and the grounds therefor. This was not done in reference to the establishment of the monthly rents for the accommodations involved. For the same reasons as have been heretofore mentioned the petitioner contends that the order of September 14, 1944, in so far as it established monthly rentals for the 2 and 3-room units, was void *ab initio* in that the petitioner had no opportunity to be heard prior to the issuance of the order.

Petitioner was arbitrarily deprived of the right to protest the rates set (before the issuance of the order)

and to protest the right of the Rent Director to establish monthly rates for the units.

This point was raised on appeal to the Regional Director, in the protest to the Price Administrator, and in the appeal to the United States Emergency Court of Appeals. The latter Court failed to rule on this point and this was again called to their attention in Petitioner's Petition for a Rehearing.

POINT 4.

THE UNITED STATES EMERGENCY COURT OF APPEALS ERRED IN REFUSING TO CONSIDER COSTS OF OPERATION AS A FACTOR TO BE CONSIDERED.

Based upon the rentals for two persons per week, the petitioner's maximum rates established in July, 1942, was in the sum of $149.00 a week, or approximately $607.00 a month. The orders of June 23, 1944, and September 14, 1944, established the rents at the rate of $57.45 a week, or approximately $235.00 a month. The Regional Order of April 30, 1944, established the rents at the rate of $82.00 a week, or $328.00 a month.

The petitioner's average monthly expenses are in the aggregate amount of $435.00, or $107.00 more than the monthly income for full occupancy. [T. 14-15.]

The actual monthly expenses are set forth in detail in the affidavit of A. J. Helfend, but the United States Emergency Court of Appeals states that the cost of operation is not a factor which the regulations require the Price Administrator to consider in reducing the complainant's maximum rents to the basis of other comparable rents.

In the instant case we have a situation where the business of the petitioner is the operation of a hotel. If he has to continue operations at a loss, then as a practical matter it will be necessary for him to cease operations, thereby depriving the occupants of a place in which to live. This certainly is not within the purview of the reasons for the enactment of the Emergency Price Control Act of 1942. It is a fundamental principle of law that even if a statute is valid on its face, the enforcement of the statute in an unreasonable manner is invalid.

> "Due process of law as guaranteed by Amendment V of the United States Constitution, is that a law shall not be unreasonable, arbitrary or capricious."
>
> *Minsky v. U. S.*, 131 F. (2d) 614 (C. C. A. Mich., 1942) (affirmed 63 S. C. T. 1241, 319 U. S. 463).

The Emergency Price Control Act of 1942 provides, among other things, as follows:

> Section 1A. ". . . and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents."
>
> Section 2B. ". . . the Administrator may by order establish such maximum rents . . . as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

In May, 1942, petitioner purchased the Hotel Helfend after it had been completely renovated, inside and outside, and furnished it with new furniture. He immediately

made a survey of the rents charged by four comparable hotels in the vicinity (and the only comparable hotels) and established his maximum rents on a basis which was approximately the same as the rents charged by the other four hotels for comparable accommodations. The hotel units were rented for the first time in early July, 1942.

The Los Angeles Defense Rental Area was created by the Price Administrator in October, 1942, with the maximum rent day as of March 1, 1942. Housing accommodations rented for the first time within sixty days of the maximum rent day are not subject to the provisions of Section 5(c)(1) of the Rent Regulation.

This Court has held that the use by Congress of the phrase "just and reasonable" in a regulatory statute (which phrase, it is contended, is equivalent in meaning to the expression "fair and equitable" in the Act here in question) implies a requirement that the rate will permit a fair return, even where the statute, like this one, does not "in terms" so require. In *Power Commission v. Hope Natural Gas Company*, 320 U. S. 591 (1944), involving the federal Natural Gas Act (52 Stat. 821), this Court said (p. 603):

> "By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."

In its comparability study the Office of Price Administration used its basis for comparable housing in the same defense rental area the four hotels whose rents served as a basis for the establishments of petitioner's rates when he first rented his hotel units in early July, 1942. They then proceeded to decrease petitioner's rents to a level slightly more than half of the levels of the rates of the other four hotels. The original rates charged by petitioner did not create any speculative, unwarranted or abnormal increase in rents. Hence, his rates were not in contravention of the aforementioned purposes of the Emergency Price Control Act of 1942.

Petitioner sought and still seeks a fair return on his investment. The Price Administrator's order gives him no return whatsoever on his investment.

The Court below (E. C. A.) states in its decision that costs of operation is not a factor to be considered in reducing petitioner's maximum rents to the basis of other comparable rents. If petitioner's rents had been higher than and were reduced to the basis of other comparable rents this point would not be raised. But his rents were reduced to a basis much below the bases of other comparable rents and his costs of operation becomes an important factor.

> "Maximum rents fixed by the Administrator are those which in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (Section 2B of the Emergency Price Control Act of 1942)."
>
> *Bowles v. Willingham,* 321 U. S. 503.

CONCLUSION.

The Rent Director cannot arbitrarily decrease rents under Section 5(c)(1) of the Rent Regulations. He must have some ground or basis for his order decreasing maximum rents under that section. In this matter there is absolutely no evidence and no showing to support the order of June 23, 1944. There is also a definite showing that the petitioner was deprived of the right to have his matter considered by an impartial and fair officer or office.

It is the contention of the petitioner that where an original proceeding is void *ab initio* that all proceedings arising out of the original matter are also void.

The petitioner sincerely believes that there is here involved an important question of Federal law not previously settled which is of such wide importance and public interest and concern that it should be definitely decided by this Court.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and that this Honorable Court should review the judgment of the United States Emergency Court of Appeals.

Dated Los Angeles California, April 8, 1947.

Respectfully submitted,

HIRAM T. KELLOGG,
Attorney for Petitioner.

DAVID A. MATLIN,
Of Counsel.

APPENDIX.

UNITED STATES EMERGENCY COURT OF APPEALS.

No. 343. A. J. Helfend v. Philip B. Fleming, Temporary Controls Administrator.

Heard at Los Angeles December 30, 1946. Before Maris, Chief Judge, and McAllister and Lindley, Judges.

Mr. David A. Matlin, for complainant.

Mr. Philip Travis, Attorney, with whom Messrs. Richard H. Field, General Counsel, Carl A. Auerbach, Associate General Counsel, Harry H. Schneider, Chief, Court Review Rent Branch, Lewis Leeds and Milton H. Shapiro, Attorneys, all of the Office of Price Administration, were on the brief, for respondent.

OPINION OF THE COURT.

(Filed February 17, 1947.)

By Maris, Chief Judge.

The complainant seeks the review of proceedings in the Office of Price Administration by which the maximum rents for rooms in the Helfend Hotel at Wilmington, in the Los Angeles defense-rental area, were reduced below the rates at which they were first rented or offered for rent by the complainant in July 1942. The regulation involved is the Rent Regulation for Hotels and Rooming Houses. The maximum rent date in the Los Angeles defense-rental area was March 1, 1942.

On June 1, 1944, the Rent Director notified complainant of a proposal to decrease his maximum weekly rents to the amounts which were listed on an exhibit accompanying the notice. On June 20, 1944 the complainant filed written objections thereto and on June 23, 1944 the Rent

Director issued an order establishing maximum weekly rents in the amounts proposed.

Subsequently on August 12, 1944 the Rent Director notified the complainant that he proposed to establish maximum daily rates for certain rooms which had apparently previously been rented or offered for rent on a daily basis by the complainant. To this notice was annexed a comparability study by a rent inspector setting forth recommended daily, monthly and weekly rents. After further proceedings the Rent Director on September 14, 1944 issued an order establishing maximum daily and monthly rents and continuing the maximum weekly rents in the amounts fixed by his previous order of June 23rd.

Applications for review of the two orders of the Rent Director were filed by the complainant with the Regional Administrator. After incorporating into the record an additional comparability study by another inspector the Regional Administrator found that maximum rents higher than those established by the Rent Director's order were justified. Accordingly by an order issued April 30, 1945, he modified the Rent Director's orders so as to establish maximum rents in the higher amounts which he found to be appropriate.

On July 26, 1945 the complainant filed his protest with the Price Administrator. Thereafter the Price Administrator incorporated into the protest record photographs of the Helfend Hotel and of other hotels alleged to be comparable and copies of registration statements of the rooms in those hotels. Complainant submitted additional evidence, and oral argument before a subcommittee of a board of review was had in Los Angeles upon the record so made up. Subsequently the board recommended to the

Price Administrator that the protest be denied except in one respect not here material. On May 10, 1946 the Price Administrator issued his order granting the protest in part and otherwise denying it as recommended by the board of review.

The complainant's principal contention is that he was denied a proper hearing in the proceedings before the Rent Director. We are inclined to agree that he was not accorded an adequate opportunity to examine and rebut prior to June 23, 1944 the evidence upon which the Rent Director relied in making his order of that date. Our examination of the subsequent proceedings makes it perfectly clear, however, that the complainant was accorded full opportunity to examine and rebut the evidence considered in the review proceeding before the Regional Administrator and in the protest proceeding before the Price Administrator and that he took full advantage of the opportunities thus accorded him. Under these circumstances the failure of the Rent Director to accord the complainant an adequate hearing in the first instance becomes immaterial. The hearings de novo by the Regional Administrator and the Price Administrator fully protected the complainant in his rights. Victor v. Porter, 157 F. 2d 769 (ECA 1946), cert. den. ..... U. S. .....

The complainant next contends that the Price Administrator erred in his findings with respect to the levels of rents for comparable accommodations on the maximum rent date which were the basis for the order fixing complainant's maximum rents. With respect to this contention we need only point out that we are not at liberty to set aside the Price Administrator's findings upon a factual issue of this character if there is substantial evidence to support them. Rabkin v. Bowles, 143 F. 2d 600

(ECA 1944). Since our examination of the record indicates that there was ample evidence to support the Price Administrator's findings they are not reviewable here.

Finally the complainant contends that the maximum rents established by the Price Administrator must be set aside because they do not permit him to realize the cost of operating the hotel. An examination of the record fails to satisfy us that the complainant has sufficiently proved a factual basis for this contention. In any event, however, cost of operation is not a factor which the regulation required the Price Administrator to consider in reducing the complainant's maximum rents to the basis of other comparable rents. In so far as the complainant seeks to attack the validity of the regulation for its failure to include cost of operation as a factor to be considered in this connection it is sufficient to point out that the Rent Regulation for Housing has been sustained against attack upon the ground that it fails to assure to the individual landlord a fair return from his property. Mortgage Underwriting and Realty Co. v. Bowles, 150 F. 2d 411, 414-5 (ECA 1945). See also Wilson v. Brown, 137 F. 2d 348, 352-4 (ECA 1943); and Bowles v. Willingham, 312 U. S. 503, 516-9 (1944). The considerations underlying that ruling are equally applicable to the Rent Regulation for Hotels and Rooming Houses.

A judgment will be entered dismissing the complaint.